

Filed April 30, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 12-O-14626
)	
MARY FRANCES PREVOST,)	OPINION
)	
A Member of the State Bar, No. 157782.)	
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A young mother living with her grandparents in Texas became concerned that she might be the subject of an investigation for a theft in San Diego. With her grandparents' financial assistance, she retained respondent Mary Frances Prevost to determine if such an investigation was underway, and if so, to represent her in the criminal matter. About a month after she was retained, Prevost stopped communicating, despite numerous telephone calls and emails from the client and her grandparents. Subsequently, the client terminated her services and asked for a refund. When Prevost did not return the fee, the client and her grandparents complained to the Office of the Chief Trial Counsel of the State Bar (OCTC).

Prevost did not respond to two letters from an OCTC investigator, and thereafter, OCTC filed a Notice of Disciplinary Charges (NDC) alleging that Prevost failed to return unearned fees, communicate with a client, and cooperate during a disciplinary investigation. The hearing judge below found Prevost culpable of all three counts of misconduct and recommended a one-year stayed suspension and two years' probation, conditioned upon restitution to the grandparents of the unearned fees owing, plus interest thereon.

Prevost appeals, requesting a private or public reproof. She argues there is a lack of clear and convincing evidence to support the culpability determinations and challenges the

judge's adverse credibility findings against her. Prevost also maintains that the hearing judge disciplined her based on a finding made outside of the scope of the NDC. OCTC asks us to affirm the hearing judge's decision.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we reject Prevost's arguments and adopt the hearing judge's culpability findings. We also adopt his finding of multiple acts of misconduct as an aggravating factor and find additional aggravation due to Prevost's overreaching. However, given Prevost's strong evidence in mitigation, including her 20 years of unblemished practice of law and her good character evidence, we conclude that the discipline recommended by the hearing judge is appropriate and will adequately protect the public, the courts, and the legal profession.

I. BACKGROUND

Our factual findings are based on the Stipulation as to Facts and Admission of Documents (Stipulation) filed on January 23, 2013, and evidence adduced at trial that satisfies the clear and convincing standard.¹

Prevost was admitted to the practice of law in California in March 1992 and has no prior disciplinary record. In 2011, Alyssa Walker, a single mother with a seven-month-old baby, was living in Texas with her grandparents, John and Vickie Hannum. Walker was a 22-year-old high school dropout with a substance abuse problem. She informed her grandfather (Hannum) that a family she had previously lived with in San Diego had accused her of stealing jewelry from them. Hannum wanted to resolve any charges that might be pending against Walker, and he obtained a referral to Prevost. In November 2011, Walker signed a retainer agreement stating that Prevost would provide her legal services in connection with "potential felony grand theft

¹ Clear and convincing evidence must leave no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

charges that may be levied against (Walker) by the San Diego District Attorney.” Hannum also signed the retainer agreement as payment guarantor, and paid \$3,500 as an advance fee on the same date.

In early December 2011, Hannum called Prevost to discuss the case, using a speakerphone since his wife and Walker were in the room. Prevost explained that she had to first obtain Walker’s approval to discuss her case, so Hannum and his wife left the room. Walker then authorized Prevost to speak with her grandparents, which Prevost confirmed when they returned to the room.

In mid-December 2011, Hannum called Prevost to inquire about the investigation, and she responded that she had been too busy to accomplish much. Later in December, Prevost emailed Hannum that she left a message for someone at the San Diego Police Department, but received no response. Between December 2011 and early March 2012, Hannum called Prevost at least eight times, his wife called her a few times, and Walker called her once. Each time, they left messages asking that Prevost return their calls, but she did not respond.

Prevost testified she stopped communicating with Hannum because even though Walker had verbally given her full permission “to divulge everything” to the Hannums, she did not believe Walker’s authorization was voluntarily given. Prevost further testified that she tried to call Walker on three or four occasions but Hannum answered the phone each time so she hung up without speaking to him or asking for Walker. In late December 2011, Hannum learned from his daughter (Walker’s mother) that no criminal charges had been filed. In March 2012, Walker and Hannum still had not heard from Prevost, prompting them to call the San Diego Bar Association, which was unable to provide assistance. Consequently, Walker and Hannum sent a letter to Prevost on March 15, 2012, advising: “After having made many phone calls and sending several emails since early January 2012 and receiving no response or return calls, we are hereby

canceling our contract with you.” They also requested a refund of the \$3,500 fee. Prevost did not respond or return the fee. She testified she did not receive their March 15th letter.²

Finally, Walker and the Hannums complained to the State Bar. Prevost stipulated that on July 3 and July 18, 2012, an OCTC investigator caused two letters to be sent to her in the ordinary course of business at her official membership records address. Neither letter was returned to OCTC. The letters requested that Prevost answer specific questions by a date certain. She did not respond to either letter, but testified that she never saw either one.³ Prevost further stipulated that on July 19 and August 2, 2012, an OCTC investigator made two telephone calls to Prevost’s official membership records telephone number and asked to speak to her. Prevost maintains that the investigator did not leave his name so she was unable to return the calls. OCTC filed and served the NDC in September 2012.

After Prevost learned of the investigation, she sent Walker a threatening email accusing her of lying to OCTC. In the email, Prevost shifted the blame to Walker for the lack of communication, speculating that Walker was “embarrassed” or “scared” of Prevost’s revelations to Hannum about Walker’s involvement with the theft and her prior police contacts. Prevost then asked Walker to reconsider her actions in filing the State Bar complaint, and suggested: “you can contact [the State Bar investigator] at 213-765-XXXX and withdraw your complaint.” Prevost closed by advising: “I WOULD APPRECIATE A RESPONSE since my entire future is on the line.” (Emphasis in the original.)

² The hearing judge found Prevost’s testimony was not credible. Hannum mailed the March 15th letter to the address listed on Prevost’s retainer agreement, but the letter was returned as undeliverable. Hannum obtained Prevost’s correct mailing address from the Internet, and sent a second letter dated March 28, 2012, canceling the retainer agreement and enclosing a copy of the March 15 correspondence. This letter was not returned.

³ The hearing judge found Prevost’s testimony was not credible that she did not receive the two letters from the State Bar investigator.

Two days later, Prevost followed up with a letter to Walker, which she mailed to the Hannums' address in Texas, and enclosed her earlier email and a copy of the NDC.⁴ In this second letter, Prevost berated Walker for allowing her grandfather to terminate Prevost's services. She again accused Walker of lying to the State Bar, claiming that Prevost had now received the NDC "which indeed alleges that you personally contacted me nearly a dozen times when, in fact, you know you never contacted me." The NDC contained no such allegation; it merely stated that from "December 2011 through March 15, 2012, Walker and Hannum emailed and telephoned Respondent to discuss the matter."

Two weeks later, Prevost sent another email, this time to Hannum, in which she stated that "people who use drugs and steal from their friends are rarely credible witnesses." She also accused Hannum of being "overbearing" and intimidating Walker into filing the complaint with the State Bar. Prevost warned Hannum of the consequences of pursuing the complaint: "[W]hatever your motivation, I would suggest you take a step back and understand that you have put Alyssa in a precarious position of lying to the State Bar of California in a public proceeding by requiring her to sign documents that you wrote, and that are patently false. She will be subject to cross examination of this. Your complaint is public record. This case is public record. I really don't wish to put Alyssa in a position to have to defend herself – and people who use drugs and steal from their friends are rarely credible witnesses – but I will do the most to defend myself" In closing, she stated, "I go to State Bar Court next week. I seriously hope you consider your actions, the consequences, and the public nature of your allegations." Hannum considered her letter to be threatening to him and his granddaughter.

With this letter, Prevost enclosed a "Billing Hours Worksheet" showing she performed 6.1 hours of service at a billing rate of \$450 for a total fee of \$2,745. She enclosed a check for

⁴ Since Walker was no longer living with her grandparents, Hannum opened the letter, believing it contained the requested \$3,500 fee refund.

\$755, which she designated as the amount of unearned fees. Subsequently, in November, Prevost telephoned Hannum to ask why he had not responded to her earlier letter and again accused him of having coerced Walker into filing her complaint. She ended the call by saying: “Have a nice life; what’s left of it.” Hannum felt threatened by the phone call.

OCTC filed the NDC on September 27, 2012. After a one-day trial, the hearing judge filed his decision on July 3, 2013, finding Prevost culpable of: (1) failing to return unearned fees, in violation of the Rules of Professional Conduct, rule 3-700(D)(2);⁵ (2) failing to communicate with a client, in violation of Business and Professions Code section 6068, subdivision (m);⁶ and (3) failing to cooperate during a disciplinary investigation, in violation of section 6068, subd. (i). The hearing judge recommend that Prevost be suspended for one year, stayed, conditioned on a period of two years’ probation and the repayment of \$3,500, minus the \$755 that had previously been refunded.

II. PREVOST’S CHALLENGE TO CREDIBILITY FINDINGS

Prevost challenges the hearing judge’s determination that she was not a credible witness. She argues that his adverse finding was in error because the judge improperly relied on her two prior felony convictions in making his credibility assessment. Although the hearing judge referred to these convictions, he expressly noted that they were remote in time, having occurred 28 years ago and before her admission to practice law. Moreover, he stated several additional bases for finding Prevost not credible, including his own observations of Prevost’s indignant and angry demeanor throughout the trial and her evasive and sarcastic answers to questions. He further pointed out that some of her testimony was contradicted by evidence introduced at trial.

⁵ All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

⁶ All further references to sections are to the Business and Professions Code.

When viewed holistically, Prevost's testimony lacks credibility. Despite evidence to the contrary, she maintains that she did not receive the following: (1) the letter from Walker and the Hannums terminating her services and demanding a refund; (2) any of the numerous phone messages left for her by the Hannums and Walker; (3) the July 3, 2012 letter from the OCTC investigator, sent in the ordinary course of business to Prevost's official membership address; (4) the July 18, 2012 letter from the OCTC investigator, sent in the ordinary course of business to Prevost's official membership address; (5) a telephone message from the investigator on July 19, 2012; and (6) a telephone message from the investigator on August 2, 2012.

We give no weight to Prevost's prior convictions in considering her credibility, but nonetheless find that the hearing judge's determination that she was not a credible witness is independently supported by the record and we give it great deference. (Rules Proc. of State Bar, rule 5.155(A).)

III. CULPABILITY

A. Count One: Rule 3-700(D)(2) (Failure to Return Unearned Fees)

Rule 3-700(D)(2) requires an attorney to "[p]romptly refund any part of a fee paid in advance that has not been earned." Prevost waited seven months after Walker and Hannum first requested a refund in March 2012, and then only after Walker complained to OCTC. She returned \$755 of the \$3,500 fee. The hearing judge found that her failure to communicate and her failure to accomplish the task for which she was hired rendered her services of no value to Walker. We agree.

According to her billing statement, Prevost's efforts on behalf of Walker were minimal, primarily sending brief emails and leaving phone messages with a pawn shop and with the San Diego Police Department. She also charged for various phone calls where she hung up without speaking to the person who answered. As a result of these most modest efforts, Prevost did not

provide any information of value about the investigation. Indeed, it was *Hannum* who independently ascertained in December of 2011 that no charges had been filed against Walker.⁷

Prevost argues on appeal that she did not immediately return the requested fees because the law at the time was unsettled as to whether she should refund them to Walker or Hannum. This argument is pretextual at best. First, she asserts she never received the demand letter from her client and the Hannums. If this were true, then she would have no reason to be concerned about the unsettled state of the law since, *arguendo*, she had no knowledge that any fees had been demanded and were therefore owed. Second, Prevost could have contacted Walker or Hannum to resolve the purported conflict as to who should receive payment or sent a check requiring joint signatures, since Walker and Hannum had jointly requested the refund. Third, the law was equally “unsettled” when she ultimately paid the \$755 refund directly to Hannum. Finally, according to her testimony, she called the State Bar Ethics Hotline for advice about who should receive the refund *after* she paid the refund.

Prevost’s seven-month delay and her reduction of the fees were too little, too late. Walker hired Prevost to achieve a specific goal, i.e., ascertain if Walker were the subject of a criminal investigation. “[Prevost] failed to achieve or take concrete steps toward this goal. To justify retention of legal fees, [she] was required to perform more than minimal preliminary services of no value to the client. [Citation.]” (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 324.) We conclude that Prevost failed to promptly return the unearned fees, in violation of rule 3-700(D)(2).

⁷ Prevost incorrectly argues that this finding is beyond the NDC because it implies no competence or an unconscionable fee. She charged for sending seven emails to Hannum about how and where to sign and send the retainer agreement and requesting his credit card information. These charges were incurred before Walker retained her. She also charged \$450 an hour for 1.3 hours of investigative work, which, according to her own retainer agreement, was to be charged at \$110 per hour.

B. Count Two: Section 6068, subdivision (m) (Failure to Communicate)

Section 6068, subdivision (m), requires attorneys to promptly respond to clients' reasonable status inquiries and to keep them reasonably informed of significant case developments. "All attorneys owe a duty to communicate adequately with their clients and to use reasonable speed in accomplishing the purposes for which they were employed. [Citation.]" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.)

Walker and Hannum, as Walker's representative, made numerous status inquiries, which were not returned by Prevost. Hannum's testimony to this effect is corroborated by the termination letter of March 15, 2012, advising: "After having made many phone calls and sending several emails since early January 2012 and receiving no response or return calls, we are hereby canceling our contract with you." Prevost's conduct clearly violated section 6068, subdivision (m). (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 153-154 [failure to respond to client status inquiries and those made on client's behalf violated § 6068, subd. (m)].)

We reject Prevost's argument that she was only required to respond to inquiries by a client's representative if that person was an attorney. Culpability for failing to communicate with a client's representative is not dependent on the representative's status as an attorney. (*In the Matter of Broderick, supra*, 3 Cal. State Bar Ct. Rptr. 138; *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 369 [culpability for failure to respond to client inquiries based not on status of client's representative but on whether inquiries were made on client's behalf].)

We also reject Prevost's assertion that her failure to respond other than during the first telephone call is excused because she believed she was not authorized to speak to Hannum. Prevost's conduct belies this belief since she communicated with Hannum on several occasions

after the initial call and billed Walker for those communications. She also felt no constraints in her October 31, 2012 email to Hannum to describe Walker as a liar, drug addict, and thief.

Moreover, no evidence indicates that Prevost made any effort to explain to either Walker or Hannum why she was not communicating until *after* the complaint was filed with OCTC. We conclude Prevost's justifications for not responding to Walker are disingenuous at best.

C. Count Three: Section 6068, subdivision (i) (Failure to Cooperate)

Section 6068, subdivision (i), requires an attorney to “cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself.” Although Prevost stipulated that the OCTC investigator in his official capacity caused two letters to be sent to her official membership records address, she did not recall seeing either of them. She thus argues on appeal that OCTC failed to prove that she knew about the letters.⁸ Pursuant to Evidence Code section 641: “A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.” As such, the Stipulation created a rebuttable presumption that Prevost received the letters. Evidence Code section 604 prescribes the effect of such a rebuttable presumption: “The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence” Prevost testified that she did not see the two letters. The hearing judge found this testimony not credible, and we agree. Neither letter was returned as undeliverable and

⁸ Prevost also stipulated that the same investigator placed two calls to her official membership telephone number, but she contends he did not identify himself and therefore she was unable to respond to him. The investigator testified that he in fact left his name and telephone number with Prevost's “secretary.” Prevost had no secretary at the time, but the *receptionist* attested that she received two calls from the State Bar. She also stated that the person did not identify himself and that no substantive message was given to Prevost. Giving Prevost the benefit of conflicting but equally reasonable inferences flowing from the evidence (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 790), we have considered only the investigator's two letters in finding Prevost culpable of failing to cooperate.

Prevost remembered receiving another letter concerning an unrelated matter from the same investigator on October 17, 2012, which provided information that was of a positive nature. In fact, the very number of communications, both telephonic and by mail, that Prevost claims she did not receive, calls into question her veracity.

We find Prevost is culpable of violating section 6068, subdivision (i). (*Bach v. State Bar* (1991) 52 Cal.3d 1201, 1208 [absent credible alternative explanation, entitled to conclude that attorney ignored two investigation letters and breached duty to cooperate where neither letter was returned].)

IV. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence under standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.⁹ Prevost has the same burden to prove mitigation. (Std. 1.6.) The hearing judge found in aggravation that Prevost committed multiple acts of misconduct. In mitigation, the judge found Prevost had no prior discipline record, suffered from extreme physical difficulties, cooperated with the State Bar, established good character, and engaged in community service.

We adopt the hearing judge's finding in aggravation of multiple acts of misconduct and add significant additional aggravation for Prevost's overreaching. We adopt the mitigation findings of lack of a discipline record, good character, and community service, but reject the judge's findings that Prevost suffered from extreme physical problems and cooperated with the State Bar.

⁹ All further references to standards are to this source and reflect the modifications to the standards effective January 1, 2014.

A. Aggravation

1. Multiple Acts of Wrongdoing (Std. 1.5(b))

Between December 2011 and March 2012, Prevost failed to respond to at least nine phone calls and one letter from Walker and Hannum. Such ongoing client neglect and disregard of her client's interests are an aggravating factor.

2. Overreaching (Std. 1.5(d))

Prevost's misconduct is aggravated by her overreaching of a most vulnerable client — a high school dropout with a serious drug addiction problem who was facing potential criminal charges. Prevost's written communications to Walker and Hannum are inexcusable in their tone and content. By impugning their character and threatening public embarrassment, Prevost clearly intended her letters and phone call to intimidate Walker and Hannum into withdrawing their complaints to OCTC. Such conduct clearly violated Prevost's fiduciary duties to Walker. "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party. [Citations.]" (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243-244.) We find this is a significant aggravating factor.

B. Mitigation

1. No Prior Record of Discipline (Std. 1.6(a))

Standard 1.6(a) provides mitigation credit for a lengthy practice without discipline where the present misconduct is not serious. We assign significant credit for Prevost's 20 years of discipline-free practice before she committed this misconduct in a single client matter. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant mitigation for over 10 years of discipline-free practice].)

2. Extreme Emotional or Physical Difficulties (Std. 1.6(d))

Suffering from extreme emotional or physical difficulties during the time of the misconduct may be considered as mitigation if: (1) the difficulties are “established by expert testimony as directly responsible” for the misconduct; and (2) the evidence establishes clearly and convincingly that the difficulties “no longer pose a risk” of future misconduct. (Std. 1.6(d).)

Prevost’s endocrinologist, who began treating her in November 2011, attested that she suffers from adrenal fatigue (also known as chronic fatigue syndrome), which caused severe fatigue, loss of concentration, and feelings of panic. The doctor attested that this was not a disease, but a condition which “will take several years to successfully treat.” The doctor did not testify that Prevost’s condition was the cause of her misconduct. Moreover, Prevost testified that she is still able to focus and perform at the same high level she has always maintained, although not as efficiently.

We assign minimal weight to this mitigating factor since there is little, if any, evidence of a nexus between Prevost’s medical condition and her misconduct. (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295 [no mitigation for alcoholism and drug addiction without clear and convincing evidence that disease caused misconduct].) There also is no evidence that Prevost has fully recovered from the effects of this condition.

3. Cooperation for Entering a Stipulation (Std. 1.6(e))

Prevost is entitled to mitigation for entering into the Stipulation about facts that were a predicate to establishing some of her culpability. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability].) But we discount the mitigative weight here because Prevost sought to disavow these facts at trial and on appeal.

4. Good Character (Std. 1.6(f))

Standard 1.6(f) authorizes mitigating credit for an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities who are aware of the full extent of the member's misconduct. We give substantial weight to Prevost's evidence of good character. She presented the testimony of two witnesses and declarations from seven individuals, which included two former clients, five attorneys, and two police officers. All attested to her good character. The attorneys portrayed her as a hard-working, zealous advocate with impeccable legal ethics. They also described her as honest and possessing the highest integrity. We give particular attention to these attorney witnesses because they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.)

5. Pro Bono Activities and Community Service

Pro bono work and community service mitigate an attorney's misconduct. (*Calvert v. State Bar, supra*, 54 Cal.3d at p. 785.) Two of Prevost's character witnesses described her pro bono activities, which included filing numerous suppression motions that eventually led to the creation of a law preventing unlicensed individuals from drawing blood used to determine blood alcohol levels. Prevost also represented various clients pro bono, and volunteered with the Leukemia and Lymphoma Society. We assign significant mitigating weight to her pro bono activities and community service.

V. LEVEL OF DISCIPLINE

When recommending discipline for professional misconduct, our primary purposes are to protect the public, the courts, and legal profession, maintain high professional standards, and preserve public confidence in the legal profession. (Std. 1.1.) In arriving at an appropriate

discipline, “we must consider the underlying conduct and review all relevant aggravating and mitigating circumstances. [Citation.]” (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932.)

We begin our discipline analysis with the standards that the Supreme Court instructs us to follow “whenever possible.” (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Although not binding, we give them great weight to promote “the consistent and uniform application of disciplinary measures. [Citation.]” (*In re Silvertown* (2005) 36 Cal.4th 81, 91.) We focus on standard 2.15, which is the most severe.¹⁰ It applies to violations of rule 3-700(D)(2) and provides “[s]uspension not to exceed three years or reproof is appropriate for a violation of a provision of the . . . Rules of Professional Conduct not specified in these Standards.”¹¹

Given the broad range of discipline (reproof to three years), we also seek guidance from case law. (*In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168 [decisional law appropriate as guidance when standards provide range of discipline].) We focus on cases involving a single client matter where the attorney failed to communicate and committed other misconduct. In recommending a one-year stayed suspension, the hearing judge found instructive *Bach v. State Bar, supra*, 52 Cal.3d 1201, and *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690. In *Bach*, the Supreme Court imposed a suspension of 30 days and until the attorney paid restitution in a single client matter. In that case, the attorney failed to perform competently, withdrew his representation without the client’s consent or court approval, failed to refund unearned fees, and failed to respond to written inquiries from a State

¹⁰ Standard 1.7(a) directs that when multiple acts of misconduct call for different sanctions, we must impose the most severe sanction. Other applicable standards include 2.5(c), which provides for reproof for violations of section 6068, subdivision (m) (failure to communicate), and 2.8(b) which calls for reproof for violations of section 6068, subdivision (i) (failure to cooperate).

¹¹ We reject Prevost’s argument that the hearing judge erred because his discipline recommendation was based on an “implicit” finding that Prevost failed to perform competently, which was not alleged in the NDC. The hearing judge plainly found that culpability was due to Prevost’s failure to return unearned fees. He did not find that she performed incompetently, only that her services were of no value to Walker.

Bar investigator. The attorney in *Bach* had no prior discipline but the Supreme Court found that his lack of insight and his attitude towards discipline evidenced his lack of cooperation. In *Aulakh, supra*, 3 Cal State Bar Ct. Rptr. 690, the attorney had no prior discipline record in 20 years of practice. Nevertheless, we recommended a 45-day suspension and restitution of \$3,000 for the attorney's failure to perform, improper withdrawal from employment, failure to refund unearned fees, and failure to provide an accounting in a single client matter. The attorney in *Aulakh* failed to cooperate in the disciplinary process.

The hearing judge determined that Prevost merited less discipline than the 30-day suspension imposed in *Bach v. State Bar, supra*, 52 Cal.3d 1201, and the 45-day suspension in *In the Matter of Aulakh, supra*, 3 Cal. State Bar Ct. Rptr. 690, because she had less aggravation and more mitigation than in *Bach*, and less misconduct and aggravation than in *Aulakh*. We agree. Although we have found additional aggravation due to Prevost's overreaching, her twenty years of discipline-free practice, her good character evidence, and her significant community service weigh heavily in favor of a one-year stayed suspension and two years' probation, conditioned upon payment of restitution. This discipline recommendation also comports with the decisional law,¹² and OCTC requests that we affirm it. Our recommendation is designed to advance the goals of the discipline system and to impress on Prevost the "high degree of care and fiduciary duty [she] owes to those [she] represents." (*Stuart v. State Bar* (1985) 40 Cal.3d 838, 847.)

¹² See e.g., *Wren v. State Bar* (1983) 34 Cal.3d 81 (45-day suspension for failure to communicate, misrepresenting case status to client, failure to perform, and presenting misleading testimony during disciplinary proceedings with no aggravating circumstances and 17 years of discipline-free practice); *Calvert v. State Bar, supra*, 54 Cal.3d 765 (60-day suspension for failure to communicate and failure to perform; mitigated by pro bono activities and community service; prior discipline but not considered aggravating because misconduct contemporaneous with present wrongdoing); *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585 (60-day suspension for failure to perform, failure to communicate, lying to client about case status, and failure to cooperate with State Bar; aggravated by significant client harm, failure to respond to NDC; mitigated by 12 years of discipline-free practice).

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Mary Frances Prevost be suspended from the practice of law for one year, that execution of that suspension be stayed, and that she be placed on probation for two years, with the following conditions:

1. Within the first 60 days of her probation, she must make restitution to John Hannum in the amount of \$2,745.00 plus 10 percent interest per annum from November 16, 2011 (or reimburse the Client Security Fund to the extent of any payment from the Fund to Hannum, in accordance with Business and Professions Code section 6140.5) and furnish satisfactory proof to the State Bar Office of Probation in Los Angeles.
2. She must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including her current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, she must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. Within 30 days after the effective date of discipline, she must contact the Office of Probation and schedule a meeting with her assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, she must meet with the probation deputy either in person or by telephone. During the period of probation, she must promptly meet with the probation deputy as directed and upon request.
5. She must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, she must state whether she has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, she must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to her personally or in writing, relating to whether she is complying or has complied with the conditions contained herein.
7. Within one year after the effective date of the discipline herein, she must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and she shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if she has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Prevost be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

EPSTEIN, J.

WE CONCUR:

PURCELL, P. J.

McELROY, J.*

* Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar of California.